

1 certificate of non-opposition to the motion. Defendants V.
2 Dolan Trucking, Inc. ("Dolan") and Argonaut Constructors,
3 Inc. ("Argonaut") do not oppose the motion but request that
4 the Court grant Underground's motion in accordance with the
5 provisions for equitable apportionment of fault under the
6 Uniform Comparative Fault Act ("UCFA"). At the Case
7 Management Conference on October 31, 2005, counsel for
8 defendant Avery & Avery Excavating ("Avery") agreed with
9 Dolan's and Argonaut's position. Following the hearing on
10 November 9, 2005, defendant Fedco Construction, Inc.

11 ("Fedco") filed a letter dated November 11, 2005, stating
12 that it had decided not to challenge Underground's motion.

13 Underground, Dolan, Argonaut and Avery urge the Court
14 to apply the UCFA instead of the "pro tanto" rule derived
15 from California Code of Civil Procedure §§ 877 and 877.6
16 and Tech-Bilt, Inc. v. Woodward-Clyde & Associates, 38 Cal.
17 3d 488 (1985) and American Motorcycle Association v.

18 Superior Court, 20 Cal. 3d 578, 604 (1978) ("A plaintiff's
19 recovery from non-settling tortfeasors should be diminished
20 only by the amount that the plaintiff has actually
21 recovered in a good faith settlement, rather than by an
22 amount measured by the settling tortfeasor's proportionate
23 responsibility to the injury.") The UCFA provides that,
24 "the claim of the releasing person against other persons is
25 reduced by the amount of the released person's equitable
26 share of the obligation determined in accordance with the

27 _____
28 U.S.C. § 636(c).

1 provisions of Section 2.” UCFA § 6. Under the UCFA,
2 plaintiff’s total claim is reduced by the proportionate
3 share of the settling defendant. Non-settling defendants
4 may not seek contribution from the settling defendant.
5 Under the UCFA, plaintiff bears the risk that the ultimate
6 liability of the settling defendant may exceed the
7 settlement amount. By contrast, under the pro tanto
8 approach, the dollar amount of settlement is deducted from
9 the judgment, and the non-settling defendants must pay the
10 remainder.

11 In the absence of clear guidance under statute or case
12 law on how to allocate environmental clean up costs in
13 private contribution lawsuits, courts must exercise
14 discretion in deciding which approach would best advance
15 the interests of justice. MFS Municipal Income Trust, et
16 al., v. American Medical International, Inc., et al., 751
17 F.Supp. 279, 286 (D. Mass. 1990). The Ninth Circuit has
18 favored the comparative fault approach, as advocated by
19 Underground, over the pro tanto approach in the interests
20 of punishing wrongdoers, limiting liability to relative
21 culpability and encouraging early and complete settlements.
22 Franklin v. Kaypro Corporation, 884 F.2d 1222, 1231 (9th
23 Cir. 1989). Plaintiff’s concerns regarding compensation of
24 tort victims and certainty of damages may also weigh in a
25 court’s decision. In this case, applying the UCFA best
26 achieves the goals articulated by the Ninth Circuit with
27 minimal disadvantages. Using the UCFA approach will
28 apportion damages according to fault and limit liability to

1 each party's proportionate share of fault, leading to more
2 parties being willing to settle.

3 The number of parties and complexity of issues in this
4 case make it similar to actions under the Comprehensive
5 Environmental Response, Compensation and Liability Act
6 ("CERCLA"), 42 U.S.C. § 9601, to which courts in New York,
7 Pennsylvania, Illinois and Missouri have applied the UCFA.
8 Although not an action under CERCLA, this case does involve
9 multiple parties and environmental issues. Several
10 defendants have not yet appeared before the Court,² and
11 further defendants may be added.³ This factor favors
12 applying the UCFA, which appears to better protect the
13 interests of defendants who have yet to appear.

14 Using the UCFA approach also negates the need for an
15 evidentiary hearing, and its attendant cost and delay, to
16 determine the fairness and good faith of the settlement.
17 Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F. 2d
18 155 (7th Cir. 1988) (evidentiary hearing to explore the
19 fairness and good faith nature of the settlement is not
20 required); Kelley v. Thomas Solvent Co., 717 F. Supp. 507
21 (W.D. Mich 1989).⁴ The disadvantages of the UCFA approach

22
23 ² A default has been entered against defendant Keith
24 Stalion dba Keith Stalion Landscaping. Defendant
25 Northwestern Construction ("Northwestern") was recently
26 served and has not yet appeared. Defendant Fedco is seeking
27 to set aside the default entered against it.

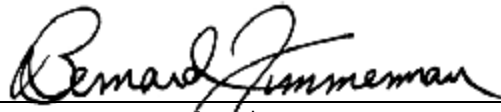
28 ³ Dolan has filed a cross-complaint against parties
not already included in this action.

⁴ Were California law to govern, I would still
approve the proposed settlement, since evidence exists to
support a finding of reasonableness and good faith. None of

are minimal since plaintiff is willing to settle with Underground and bear the risk of settling for an amount that turns out to be too low.

IT IS HEREBY ORDERED that Underground's motion for approval of the settlement agreement and entry of order barring contribution claims pursuant to the Uniform Comparative Fault Act is **GRANTED**. Other parties to this action are barred from bringing claims for contribution against Underground that relate to the claims and disputes that are alleged or could have been alleged in this action.

Dated: November 30, 2005



Bernard Zimmerman
United States Magistrate Judge

G:\BZALL\BZCASES\C.A.RASMUSSEN CO\UNDERGROUND.ORDER.wpd

the parties that have appeared are disputing that the settlement is in good faith, and there is no reason to find otherwise. Plaintiff's counsel has declared that the settlement was negotiated at arm's length. Wellman v. Dickinson, 647 F. 2d 163 (2nd Cir. 1981) (Where there is arms-length bargaining among the parties and sufficient discovery has taken place to enable counsel to evaluate accurately the strengths and weaknesses of the plaintiff's case, there is a presumption in favor of settlement.) In an action where plaintiff seeks \$125,000 in damages from roughly 10 defendants, Underground's settlement for \$10,000 seems within the "ballpark." Tech-Bilt, 38 Cal. 3d at 488 (taking into account a number of factors, "including a rough approximation of plaintiffs' total recovery and the settler's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settler should pay less in settlement than if he would be found liable after trial," to determine if a settlement is in good faith).